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No. 99-739

IN THE
Supreme Court of the United States

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA,
Petitioner,
v.
DAVINE ALEXANDER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The Sixth Circuit decision here imposed both "vicarious" and "direct" 42 U.S.C. § 1981/Title VII of the Civil Rights Act of 1964 liability on the petitioner Laborers' International Union of North America, AFL-CIO (LIUNA) for the discriminatory employment referral practices of a LIUNA affiliated local union (Local 496) in the Local's administration of the Local's hiring hall.

Our *certiorari* petition from that decision was devoted to the following showing: *First*, the decision predicated LIUNA's liability on the International Union's "neglect" to investigate and remedy charges of employment referral discrimination against Local 496 of which LIUNA was on notice, *viz.*, on an "inaction" theory of liability. *See* Pet. at 5-9. *Second*, imposing § 1981/Title VII liability on such an "inaction" theory is contrary to decisions of this Court and of other courts of appeals, reworks the § 1981/Title VII law in a fundamental regard and with profound consequences, and on both grounds warrants this Court's review. *See id.* at 9-25.

Respondents, in tacit admission that given our premise we are right and that the questions we present in the petition are open and important questions going to the essence of the § 1981/Title VII enforcement scheme, spend their energies in attempting to rebut us on the true basis of the decision below.

To be sure, respondents grudgingly acknowledge that LIUNA's *inaction* upon being put on notice of the employment referral discrimination charges against Local 496 was *a* focal point of the Sixth Circuit panel majority opinion, and, indeed, that LIUNA's "acquiesce[nse]" in the Local's discrimination was the "most important[]" fact supporting the Sixth Circuit's direct, "affirmative duty" liability holding. *See* Resp. Br. at 16. But their central premise is that the *certiorari* petition "neglected to men-

tion"/"conveniently ignores" an additional "fact" that entered into the decision below in a "crucial" way: *viz.*, LIUNA's *action* in negotiating a National Maintenance Agreement in March of 1985 which—according to the panel majority and respondents—" 'provided that Local 496 was to act as LIUNA's agent in filling all laborer vacancies at [the] Perry [Nuclear Plant project].' " *Id.* at 2, 11 (quoting Pet. App. 5a); *see also id.* at 13. When that crucial fact is taken into account, respondents assert, it is apparent that the decision below does nothing more than apply "settled law as regards the liability of LIUNA" to the "egregious facts" at hand. *Id.* at 16. And, say respondents, a decision of this nature does not warrant review by this Court. *Id.*[1]

Respondents are, of course, quite correct in stating that a decision of the nature they describe is not worthy of this Court's review. But respondents could not be more wrong in their central premise that the decision below *is* of such a nature.

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[1] Respondents embellish on their central premise by positing the further "fact" that LIUNA had entered into the National Maintenance Agreement with knowledge of an "historical pattern of discrimination" by Local 496 that was attributable "in part" to the Local's adherence to a LIUNA constitutional rule (*i.e.*, the working-at-the-calling-rule). *See* Resp. Br. at i, 7, 13. But the record belies this "factual" assertion.

First, as of the March 1985 date of the National Maintenance Agreement, there had been *no* administrative or judicial finding of discriminatory employment referral practices by Local 496, yet alone a finding of a "pattern" of such discriminatory practices.

Second, respondents' *ipse dixit* to the contrary notwithstanding, the employment referral discrimination of which Local 496 was ultimately found guilty—after many years of litigation—manifestly was *not* attributable in *any* "part" or degree to LIUNA's working-at-the-calling rule. For that rule by its terms has *no* application to local union hiring referrals or to local union hiring halls. *See* Pet. at 4 n.1, 23-24. Indeed, both the panel majority and Judge Batchelder in dissent made the point that the working-at-the-calling rule had no such application, although their use of "waiver" terminology to make the point was imprecise. *See id.*

1. To begin, respondents' statement that " 'the Maintenance Agreement provided that Local 496 was to act as LIUNA's agent in filling all laborer vacancies at Perry,' " Resp. Br. at 2—which is taken verbatim from the Sixth Circuit panel majority opinion, *see* Pet. App. 5a—is not a statement of "fact" at all, but rather a statement of a *legal* conclusion. And, as we demonstrate in section 2 below, the panel majority's conclusion in that regard—which is stated in unreasoned *ipse dixit*, *see* Pet. App. 23a, and from which Judge Batchelder dissented, *see id.* 60a-61a—is contrary to, rather than in accord with, the settled law.

The operative "fact" in this context—which we by no means ignored in our *certiorari* petition, *see* Pet. at 5, is the provision in the Maintenance Agreement stating that "[t]he employer agrees to hire men in any territory where work is being performed or is to be performed in accordance with the hiring procedure existing in the territory where the work is being performed or is performed." Pet. App. 58a.

a. Putting all questions of legal interpretation of this contractual provision to one side, there is one point of fact that is *not subject to any dispute*: the Maintenance Agreement was consummated and became effective in March of 1985. Thus, that Agreement and its hiring procedure provision cannot possibly provide any basis whatsoever for the Sixth Circuit decision's imposition of liability on LIUNA for Local 496's employment referral discrimination *during the pre-March 1985 construction phase of the Perry Nuclear Plant project*, whether on a vicarious liability theory or otherwise.[2]

That being so, it is very much to the point that respondents have not cited *any* "fact" over and above LIUNA

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[2] Approximately 2/3 of the liability imposed on LIUNA by virtue of the decision below is attributable to Local 496's pre-March 1985 construction phase employment referral discrimination.

inaction in investigating and remedying the charges of Local 496 construction phase employment referral discrimination that even arguably supports the imposition of liability on LIUNA for that discrimination. Nor could they. It is undisputed that LIUNA was *not* a party to the Project Labor Agreement (PLA) under which Local 496 had the authority to refer laborers for the construction phase of the Perry project. *See* Pet. App. 2a-3a; *see also id.* 65a (Batchelder, J., dissenting). And, it likewise is undisputed that LIUNA representatives played *no* role in Local 496's decision to make or not to make construction phase employment referrals. *Id.* 5a.

Contrary to respondents' assertion, then, the imposition of liability on LIUNA for Local 496's pre-March 1985 construction phase employment referral discrimination can not be explained away as the mere application of "settled law" resting on LIUNA actions. The "facts" upon which that liability determination must stand or fall consist *entirely* of LIUNA "neglect" to investigate and remedy the charges that Local 496 had engaged in such employment referral discrimination during this phase of the Perry project. There is *no* law, settled or otherwise, that supports such an "inaction" § 1981/Title VII liability theory. *See* Pet. at 13-25.

Very simply stated, then, it is plain beyond peradventure that the Sixth Circuit's construction phase liability determination was predicated entirely on one entity's inaction in investigating and remedying the discriminatory acts of another, legally-separate entity. Respondents' effort to obfuscate that point fails entirely.

b. It is telling as to the certworthiness of the Sixth Circuit's true "inaction" liability theory that when respondents finally seek to defend that theory for what it is all they can do is purport to distinguish "the labor cases cited by LIUNA" that uniformly have rejected such a

theory. *See* Resp. Br. at 15.[3] They are reduced to that desperate strategy by the lack of any case authority supporting that theory.

Respondents' "distinction" is this: "The situation" here is "substantially different," because § 1981/Title VII "are *remedial in nature*," and "[u]nlike the purely economic issues involved in the cases cited by LIUNA, there is a moral dimension to the issues presented here." Resp. Br. at 15-16 (emphasis in original). But that "distinction" can not withstand a moment's scrutiny.

It takes nothing from the high national and social purposes of—and the moral imperatives of—§ 1981/Title VII to recognize that the federal statutes at issue in "the labor cases" respondents would so cavalierly dismiss were designed to achieve high national and social purposes in their own right (*e.g.*, industrial peace with a greater measure of economic justice; and union democracy)—purposes with a strong moral, as well as economic, dimension.

What explains the uniform result in these "labor cases" is the absence of adequate—indeed, the absence of any—support in the applicable statutory text and history for the proposition that Congress intended to achieve the labor statute's purposes and moral imperatives by means of imposing on third parties generally (or international unions in particular) a duty to investigate and remedy allegations of statutory violations by first parties generally (or affiliated local unions in particular).

There is no greater support for that proposition in the language and history of § 1981 and Title VII. *See* Pet. at 14-16. And, it manifestly is not the role of a federal court to rewrite § 1981 and Title VII to satisfy its own particular vision of how best to effectuate the statutes' purposes and moral imperatives. *See id.* at 17-18.

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[3] Those cases include *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212 (1979). *See* Pet. at 18-19.

c. Respondents, moreover, do nothing in their opposition brief to counter our showing as to the profound implications of the Sixth Circuit's "inaction" § 1981/Title VII liability theory. There is no denying that the Sixth Circuit's adoption of that theory *does* "make new law in the international-local union context." *Cf.* Resp. Br. at 17. Unless international unions can reorder in a fundamental way their basic constitutional structures which maintain the internationals and their affiliated local unions as separate legal persons—a reordering that would impose substantial costs on the internationals, on their affiliates and on their members, and would severely strain traditional concepts of union democracy and autonomy—the internationals face endless litigation and massive potential liability under that new law. *See* Pet. at 11-12, 16 & n.5.

Moreover, and notwithstanding respondents' soothing assurances to the contrary, *see* Resp. Br. at 17, there is no legal—and no equitable—basis upon which the Sixth Circuit's § 1981/Title VII "inaction" liability theory could be applied to international unions with legally-separate affiliated locals, but not to corporate parents with legally-separate subsidiaries or national employer associations with legally-separate local chapters. In each of these settings, the relationship between the legally-separate entities is one of contractual affiliation or more strongly yet of outright ownership. And, in each of these settings the claim that the remedial purposes of § 1981/Title VII would be furthered by imposing a third party duty on the former to investigate and remedy charges of discrimination against the latter is equally applicable.

2. Respondents are at least correct in their reading of the Sixth Circuit decision as a decision that treats LIUNA's negotiation of the 1985 National Maintenance Agreement and its hiring procedure provision as "action" that makes its affiliated local unions that administer hiring referral systems the International Union's agents and that

generates International Union § 1981/Title VII liability for a local union's discrimination in making employment referrals. But, contrary to respondents' claim, the Sixth Circuit decision does not rest on "settled law" in this respect. *See* Resp. Br. at 6-9, 12, 16. Rather, this holding of the court below is directly contrary to this Court's international union-local union agency law, and has nothing to do with the court of appeals' decisions cited in the panel majority opinion.

a. The decision below cannot be squared with this Court's decision in *Carbon Fuel.*

At bottom, the Sixth Circuit's maintenance phase liability determination—and respondents' impassioned defense of that determination—rests on the premise that LIUNA assumed an affirmative duty to prevent post-March 1985 maintenance phase employment referral discrimination by Local 496 by entering into a national agreement that "delegated [LIUNA's own] referral authority" to Local 496. *See* Resp. Br. at i, 6-7, 13-14.

But that premise is one that *Carbon Fuel* squarely rejects. The situation in *Carbon Fuel* was not one whit different in this crucial respect: there, the international union signed a national coal industry agreement that prohibited strikes during the term of the agreement but provided no mechanism for preventing such strikes at the local union level, thus effectively "delegating" to each affiliated local union the power of compliance or noncompliance with the contractual no-strike obligation.

In this directly-analogous setting, the *Carbon Fuel* Court declined to impose an affirmative duty on the international union to prevent breaches of the no-strike obligation by its affiliated local unions, and held that the international union could *not* be held liable for such breaches absent evidence that it had "instigated, supported, ratified, or encouraged" those breaches. 444 U.S. at 216-18.

As our *certiorari* petition shows, that holding was in keeping with traditional common-law agency principles as this Court consistently has pronounced and applied those principles in the international union/affiliated local union context. Under these traditional common-law agency principles, an international union is legally responsible for *its own* conduct—*i.e.*, the conduct of *its own* officials and employees—and *not* for the conduct of affiliated local unions in the exercise of their own authority explicitly or implicitly "delegated" to them by the international union. *See* Pet. at 19-25.

b. The "settled law" that the panel majority opinion and respondents invoke has nothing to do with this case or with *Carbon Fuel* and its progeny. That law consists of a line of court of appeals' decisions holding—quite unremarkably—that international unions that negotiate or actively assist in negotiating *substantive provisions* that its affiliated local unions are contractually bound to follow have a § 1981/Tite VII duty to ensure that those *substantive provisions* are non-discriminatory on their face *and* in effect, and a corresponding § 1981/Title VII liability for breaches of that duty. *See* Pet. App. 22a-25a (citing several such decisions); Resp. Br. at 6-9, 12 (citing these and other like decisions).

A leading decision in this line—exemplifying both its limited scope and its quite unremarkable rationale—is *Sagers v. Yellow Freight Systems, Inc.*, 529 F.2d 721 (5th Cir. 1976), relied on heavily in the panel majority opinion and by respondents. In *Sagers*, the Teamsters International Union and a Teamsters intermediate body, the Southern Conference, were parties to a series of national and regional trucking agreements containing *substantive "dual seniority" provisions* that were found to have a discriminatory effect as implemented by, *inter alia*, affiliated local unions in the Houston, Texas area that were bound by the national and regional agreements. The

Teamsters International Union and the Southern Conference sought to defend a § 1981/Title VII suit against them on the grounds that the dual seniority provisions *that the Teamsters International and the Conference themselves had negotiated* "are not on their face discriminatory and [that] they had no notice that there was discrimination at the Houston terminal." 529 F.2d at 737 n.32. The Fifth Circuit was singularly unimpressed with that argument under these circumstances:

> These union organizations have a duty under § 1981 to inquire into the effect of the contract provisions when it is reasonable to assume, as it is here, that they might lead to discrimination. . . . This duty includes the responsibility to determine if the agreements they help negotiate lock in any such past discrimination. [529 F.2d at 737 n.32 (internal quotations omitted).]

Here, in sharp contrast, the National Maintenance Agreement negotiated by LIUNA in March of 1985 did *not* contain any *substantive employment referral provisions* that Local 496 was contractually bound to follow. To the contrary, as Judge Batchelder pointed out in her dissenting opinion below, LIUNA "merely secur[ed] in the National Maintenance Agreement a promise that the [maintenance] contractors will follow Local 496's hiring procedures, *whatever they may be*." Pet. App. 61a (Batchelder, J., dissenting) (emphasis added). That being so, *Sagers* and like decisions cited in the panel majority opinion and by respondents are not on point and do not support the imposition of liability on LIUNA for Local 496's post-March 1985 maintenance phase employment referral discrimination. As Judge Batchelder put it, "[i]n the cases cited . . . the provisions in question were themselves discriminatory and were explicitly negotiated by the international." *Id.* 61a-62a; *see also id.* 62a-63a.

c. The Sixth Circuit's reliance on the National Maintenance Agreement in holding LIUNA directly and vicari-

ously liable here, in addition to being in direct conflict with *Carbon Fuel*, has profound consequences for the great many international unions that negotiate national or regional agreements on behalf of their affiliated local unions in a great many industries in this country.

International unions negotiate such national and regional agreements in a wide variety of different settings, including the construction industry setting in which this case arises, the trucking industry setting in which the Fifth Circuit decision in *Sagers* arose, and the coal industry setting in which this Court's decision in *Carbon Fuel* arose. It is one thing to hold, as the *Sagers* line of decisions does, that an international union is legally responsible for the discriminatory effect of substantive contract provisions that affiliated local unions are bound to follow by virtue of their inclusion in a national or regional agreement negotiated by the international union itself. But it is quite another thing to hold, as the Sixth Circuit did here, that an international union is legally responsible for its affiliated local unions' discrimination in the local's autonomous exercise of its authority under such an agreement.

The practical consequence of such a holding is to force international unions to refrain from negotiating such agreements and to reserve all such contractual authority for itself; otherwise, the internationals will be liable for any and all transgressions by their affiliated local unions in the exercise of the locals' "delegated" authority. It is no exaggeration to say that this would work a radical transformation in the traditional relations between international unions and their affiliated local unions in numerous industries within this country, as well as the normal processes of collective bargaining in those industries.

CONCLUSION

For the foregoing reasons, and those stated in the *certiorari* petition, the petition should be granted.

Respectfully submitted,

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